JOHN DANIEL CHONG LAI MAN

v.

MAJOR HJ MOHAMAD HUSSAIN HJ MOHAMAD

HIGH COURT BRUNEI DARUSSALAM
DAVID JOHN LEONARD JC
[CIVIL SUIT NO. 3-2003]
14 AUGUST 2004

LIMITATION: *Contract - Loan - Emergency (Limitation) Order 1991, ss. 9 and 10 - Whether plaintiff's claim statute barred*

The plaintiff by a writ issued on 8 January 2003 brought an action for debt against the defendant. It was the plaintiff's claim that he had made a loan to the defendant by delivering to him a draft drawn in favour of a third party on 7 July 1986. He made a written demand for payment on 19 July 2002. On 1 November 2003, the defendant took out a summons, seeking an order that the writ and statement of claim be struck out as being scandalous, frivolous, vexatious and or otherwise an abuse of the process. The defendant pleaded that the action was statute-barred. On a date not pleaded, the defendant had given the plaintiff a cheque dated 20 July 1986. It was the plaintiff's averment that the cheque had been given as security for the loan. A registrar struck out the claim as being statute-barred. The plaintiff appealed. The issues were (1) whether the alleged giving of the cheque as security would have had the effect of causing time to run from the date of the loan, as provided by s. 9 of the Emergency (Limitation) Order 1991 and (2) if s. 10 Emergency (Limitation) Order 1991 applied, whether it would run from the date of written demand.

Held (allowing the appeal):

(1) On the plaintiff's claim as pleaded, s. 10 of the Order applied so that the six-year limitation period ran from the date of the written demand. The scheme and rationale of the legislation in England, upon which the Brunei Darussalam legislation was based, was explained by the English Court of Appeal in *Boot v. Boot*. (paras 34, 35 & 36)

Case(s) referred to:
Boot v. Boot [1996] TLR 284 ***(refd)***
In re Brown's Estate; Brown v. Brown [1893] 2 Ch 300 ***(refd)***

Legislation referred to:
Emergency (Limitation) Order 1991 [Bru], ss. 9, 10(2)(b)
Limitation Act [Eng], s. 6

For the appellant/plaintiff - Christopher Sawan; M/s Ho & Siong
For the respondent/defendant - Kelvin Lim; M/s K Lim & Co

JUDGMENT

Leonard JC:

[1] The plaintiff by a writ issued on 8 January 2003 brought an action for debt against the defendant. On 1 November 2003 the defendant took out a summons, seeking an order that the writ and statement of claim be struck out as being scandalous, frivolous and vexatious or otherwise an abuse of process. The registrar after a hearing ordered the writ and statement of claim to be struck out on the ground that it was time-barred and the plaintiff brings the matter before this court by way of an appeal from that decision.

[2] This appeal is concerned with the question whether the plaintiff's claim is statute-barred by virtue of the provisions of the Emergency (Limitation) Order 1991 ('the Order'). The answer depends on the terms of a contract of loan into which the parties are alleged by the plaintiff to have entered.

[3] The order is expressly pleaded in the defence. Endorsed on the writ is the following claim:

> The plaintiff's claim is for the sum of B$215,500 being money paid by the plaintiff to P.T. Petrochem Diagra, a company registered under the Law of Indonesia, for and on behalf of the plaintiff and at his request.

[4] It is necessary to turn to the statement of claim in order to see how the plaintiff puts his case.

Paragraphs 1 and 2 of the statement of claim read:

> 1. On or about the 7th day of July, 1986, the defendant requested the plaintiff for a personal loan in the sum of United States dollars one hundred thousand only (US$100,000) which was equivalent to Brunei dollars two hundred and eighteen thousand seven hundred and fifty only (B$218,750) at the rate of exchanged (sic) US$1 to B$2.1875 at that time.

2. The plaintiff was further instructed by the defendant to purchase on behalf of the defendant with the aforesaid loan, a Standard Chartered Bank draft made payable to a company named P.T. Petrochem Diagra, in order that the defendant may purchase shares in the company.

[5] It will be noted that the first paragraph alleges a request and the second alleges an instruction but the plaintiff does not say whether or not he complied with the request or obeyed the instruction. The reader is apparently expected to assume that the plaintiff did make the loan and did purchase the draft as instructed.

[6] The plaintiff does not say that he handed the draft to the defendant. However, there is a hint in para. 3 that the reader is expected to assume that such is the case. As that paragraph sets out what is said to be an alternative averment, that averment must be alternative to something. Paragraph 3 reads:

Further or in the alternative it is alleged that the said Standard Chartered Bank draft in the sum of US$100,000 was paid by the plaintiff to P.T. Petrochem Diagra for and on behalf of the defendant and at his request.

[7] The plaintiff made an affidavit on 19 December, 2003 and it was filed in support of his opposition to the application to strike out. That affidavit serves further to confuse the picture. After saying that he will rely upon the statement of claim as a concise statement of the facts, he proceeds to contradict it.

[8] In the statement of claim the date of the alleged request for a loan was on or about 7 July 1986, yet in order to support the allegation, the plaintiff annexed two copy documents to his aforementioned affidavit, which documents do not appear to support his case so far as the alleged date is concerned. One is a copy of a form that shows that he applied for a draft for US$ 100,000 in favour of P.T. Petrochem Diagra on 27 June 1986. The other is a copy of a draft dated 27 June 1986, in favour of P.T. Petrochem Diagra for USD$100,000.

[9] One might be tempted to think that the discrepancy could be removed simply by amending the claim so as to aver that the alleged loan took place on 27 June. However, the diligence of the defendant's solicitors has brought to light from the custody of the plaintiff's solicitors a copy of another draft in identical terms to the

draft of 27 June 1986, save that it is dated 7 July 1986. Surprisingly, that later draft was not exhibited to the plaintiff's affidavit.

[10] Despite the production of the two copy documents in circumstances suggesting that they had something to do with the claim, I will assume for the purposes of the present proceeding that the claim relates to the later draft, dated 7 July 1986. Indeed the plaintiff is relying for support of his claim upon a document dated 3 September 1992 allegedly signed by the defendant. It is, on the face of it, an acknowledgement of the alleged loan of 7 July 1986, though the defendant denies that it bears that interpretation.

[11] The plaintiff in para. 10 of his affidavit says:

> I confirm that the said bank draft was subsequently handed to the defendant personally.

[12] That appears to dispose of the implied alternative pleading in the statement of claim. Thus it would appear that the plaintiff's case is that on 7 July 1986 in response to the defendant's request for a loan of US$100,000, he gave to the defendant a draft dated that day, payable to the 3rd party. Paragraph 4 of the statement of claim says:

> 4. It was also understood between the plaintiff and the defendant that the said loan was to be repaid as and when the plaintiff should require repayment.

[13] The word "demand" is not used but I understand the plaintiff's case to be that the loan was repayable on demand.

[14] There is another averment as to the terms of the loan. Paragraph 5 of the statement of claim reads:

> In the meantime as a security for the due repayment of the said loan the defendant issued Citibank cheque No. 134540 dated 20th July, 1986 for the sum of B$250,000

[15] The plaintiff does not give a date upon which the cheque was given to him. The pilirase "in the meantime" is too vague to be of use.

[16] The defendant denies that there ever was a loan to him by the plaintiff. He says that the draft was intended by the plaintiff to be an investment in the payee company by the plaintiff for the

benefit of the plaintiff. As to the cheque, the defendant says that it was intended to be a loan to the plaintiff who never took up the loan by presenting it. The defendant denies that the document signed by him is an admission although I must say that on its face it plainly is an admission.

[17] Assuming that the alleged loan was made on 7 July 1986 on the terms described by the plaintiff then it falls to be classified as a simple contract (as distinct from a specialty).

[18] Section 9 of the Order provides that:

> An action founded on a simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

[19] At common law, a loan repayable on demand is a loan repayable at any time. See *In re Brown's Estate; Brown v. Brown* [1893] 2 Ch 300, 304-305.

[20] The cause of action accrued upon the making of the loan and it is from that time that the limitation period will run if s. 9 applies. In that case, the right of action accrued on 7 July 1986 and the limitation period expired six years later on 7 July 1992. This action commenced on 8 January 2003, sixteen and a half years after the date of the loan.

[21] The plaintiff says that he made a demand for payment by a letter dated 19 July 2002, which date is after the expiration of the six years limitation period. The alleged signed admission by the defendant is dated 3 September 1992, by which date the six years limitation period had expired.

[22] There were a few payments of sums of money by the defendant to the plaintiff, starting on 5 December 1995, all well outside the six years limitation period. If s. 9 applied from the date of the loan, none of these matters could preserve the right of action. I should mention that the defendant maintains that the payments had nothing whatever to do with the alleged loan.

[23] The plaintiff submits that it is not s. 9 but rather s. 10 that applies.

[24] It is necessary here to set out the terms of s. 10 of the order. They are as follows:

A 10 (1) Subject to subsection (3), section 9 shall not bar the right of action on a contract of loan to which this section applies.

(2) This section applies to any contract of loan which:

(a) does not provide for repayment of the debt on or before
B a fixed or determinable date; and

(b) does not effectively (whether or not it purports to do so) make the obligation to repay the debt conditional on a demand for repayment made by or on behalf of the creditor or on any other matter;

C

except where in connection with taking the loan the debtor enters into any collateral obligation to pay the amount of the debt or any part of it (as, for example, by delivering a promissory note as security for the debt) on terms which would exclude the application of this section to the contract of
D loan if they applied directly to repayment of the debt.

(3) Where a demand in writing for repayment of the debt under a contract of loan to which this section applies is made by or on behalf of the creditor (or, where there are joint creditors, by or on behalf of any one of them) section
E 9 shall thereupon apply as if the cause of action to recover the debt had accrued on the date on which the demand was made.

(4) In this section, "promissory note" has the meaning as in
F subsection (1) of section 88 the Bills of Exchange Act (Cap. 172).

[25] On the plaintiff's case, the contract of loan did not provide for repayment on or before a fixed or determinable date
G (s. 10(2)(a)).

[26] As I have said, the right of action and the obligation to pay arose at common law upon the making of the loan so the contract in this case did not effectively make the obligation to repay conditional upon a demand for repayment made by or on behalf
H of the creditor or on any other matter (s. 10(2)(b)).

[27] In the light of what I have said so far, it would appear that the loan in question fulfils the requirements of s. 10(2) but there is an exception that follows that subsection. The defendant argues
I that the exception applies here because on the plaintiff's own case, the defendant entered into a collateral obligation to pay the amount of the debt by delivering as a security the cheque to

which reference has been made. It is contended for the defendant that this is so because, the defendant submits, a cheque is payable on demand and on or before a fixed or determinable date.

[28] To add to the puzzle, in his affidavit in opposition to the defendant's application to strike out, the plaintiff says that the defendant told him that he was only to cash the cheque upon instruction, that such instruction was never given and that subsequently the defendant told him not to cash the cheque. The plaintiff discovered that the account was closed. The plaintiff seems to be suggesting now that the cheque was no security.

[29] There is an averment in the statement of claim that "The said cheque was not presented for payment upon further request of the plaintiff upon consideration hereafter mention". The plaintiff alleges that he agreed to withhold presentation of the cheque in consideration of the defendant issuing the acknowledgement of 3 September 1992. I do not take the statement of claim, read with the affidavit, as suggesting that the cheque was given otherwise than as security for the loan. It does not appear to me that the plaintiff is saying that there was an agreement from the start that the cheque could not be cashed by him without permission. Had that been the case there would have been no need for the defendant to give the acknowledgement in exchange for the plaintiff's promise not to present the cheque.

[30] Had the plaintiff delivered a promissory note signed by him, relating to the loan in question the defendant would have been on stronger ground. I would hesitate, however, without hearing full argument, to find that the particular obligations assumed by various parties to a cheque, such as drawer, drawee and acceptor could so be imported by implication into a contract of loan between friends as to deprive the borrower of the assistance afforded by s. 10.

[31] If I were persuaded that such obligations could so be imported, there would be further matters to be considered. In the first place, the cheque was allegedly delivered in connection with the loan but that is not the same as delivering it in connection with the taking of the loan. The vague manner in which the plaintiff's case is pleaded does not specify a date when the cheque was given to the plaintiff. If the dates on the draft and the cheque are an indication of when those documents changed hands, the loan agreement was thirteen days old when the cheque

A appears to have been drawn and handed over. There is no suggestion that it was a post-dated cheque that was delivered at the time of the loan. It seems to me that a cheque in such circumstances would have been delivered in connection with the loan but not in connection with the taking of that loan, which
B was in the past.

[32] The amount of the cheque is not the same as the amount of the loan. It is for a sum greater than the amount of the debt, not 'the amount of the debt or any part of it' (s. 10(2)). The
C defendant denies that there is any connection between the alleged loan and the cheque.

[33] I have come to the conclusion that it is not the plaintiff's pleaded case that then; is a collateral obligation to repay, made in
D connection with the taking of the loan, on terms that would exclude the application of s. 10. It is certainly not the defendant's pleaded case.

[34] I thus come to the conclusion that since the exception does not arise on the case as pleaded, the loan agreement when made
E was subject to s. 10 rather than s. 9. That means that time did not start to run against the plaintiff until he made written demand for repayment, which he did on 19 July 2002 as averred in para. 8 of the statement of claim.

F **[35]** By virtue of s. 10(3) of the order, s. 9 applied from that date. On that basis the proceedings were within the six years limitation period and do not fall to be struck out as being statute-barred.

G **[36]** It is true that unfortunately there has been a very long delay between the making of the loan and the commencement of the action. Section 10 is modelled on s. 6 of the Limitation Act in England, which came in to being to recognize the special position of loans made between friends or relatives in the expectation that
H many years might elapse before repayment. It was felt that the strict application of a six years time limit from the date of the loan did not accord with the understanding that such parties would normally have. See *Boot v. Boot* [1996] TLR 284, where the Court of Appeal in England explains the background to the scheme of
I the legislation from which ours is derived. The parties to this action, as is made clear in the pleadings, were friends at the

material time and although the sum of money was substantial, the plaintiff's case is that the loan was a private transaction rather than a commercial one.

[37] The various uncertainties with which I have been faced because of the state of the pleadings may no longer exist when the case comes to trial. If the judge decides, in view of the facts he has found after hearing the evidence, that the action is statute-barred he can make the appropriate order.

[38] Unless the defendant changes his stance at the trial, he may be expected to deny the allegation that the cheque was given as security for the loan that he denies taking. Yet that is the very allegation on which he has relied as a ground for saying that the alleged loan must have been governed from the outset by s. 9.

[39] The appeal is allowed and there will be an order that the order striking out the writ and statement of claim will be set aside.

[40] There will be an order nisi that the question of the costs of this appeal here and below be reserved to the trial judge.

Appeal allowed accordingly.